

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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IN RE: AUTOMOTIVE PARTS) Master File No. 12-2311
ANTITRUST LITIGATION) Hon. Marianne O. Battani

IN RE: All Auto Parts Cases)

THIS RELATES TO:)
All Auto Parts Cases)

HONDA AND TOYOTA'S OBJECTIONS TO THE
SPECIAL MASTER'S ORDER

BEFORE THE HONORABLE MARIANNE O. BATTANI
United States District Judge
Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, Michigan
Tuesday, May 16, 2017

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1 Detroit, Michigan

2 Tuesday, May 16, 2017

3 at about 2:04 p.m.

4 — — —

5 (Court and Counsel present.)

6 THE LAW CLERK: Please rise.

7 The United States District Court for the Eastern

8 District of Michigan is now in session, the Honorable

9 Marianne O. Battani presiding.

10 You may be seated.

11 THE COURT: Good afternoon.

12 THE ATTORNEYS: (Collectively) Good afternoon, Your

13 Honor.

14 THE COURT: All right. One minute. All right.

15 May I have your appearances, please?

16 MS. SESSIONS: Good afternoon, Your Honor.

17 Justina Sessions of Keker, VanNest & Peters, here on behalf

18 Honda.

19 MR. SCHAPER: Good afternoon, Your Honor.

20 Michael Schaper from Debevoise & Plimpton on behalf of

21 Toyota.

22 MR. HEMLOCK: Good afternoon, Your Honor.

23 Adam Hemlock, Weil, Gotshal & Manges, on behalf of the

24 Bridgestone and Calsonic defendants.

25 MS. CASSELMAN: Good afternoon, Your Honor.

1 Jill Casselman of Robins Kaplan on behalf of the end payor
2 plaintiffs.

3 MR. ROWE: Good afternoon, Your Honor. David Rowe
4 for Sanden, one of the defendants.

5 MR. SCHOTZBARGER: Good afternoon.
6 Williams Shotzburger of Duane Morris for the truck and
7 equipment dealer plaintiffs.

8 THE COURT: Okay. Who wants to start?

9 MS. SESSIONS: Your Honor, I think we have -- there
10 are two Honda objections at issue and one Toyota objection at
11 issue today. We are happy to take them in whatever order you
12 prefer; we're flexible.

13 THE COURT: Okay. Why don't you start then with --
14 let me find what I have here first. Let's take Honda's
15 objections to the December 29th order, that would be oldest
16 one first.

17 MS. SESSIONS: Correct. Good afternoon, Your
18 Honor. Justina Sessions, Keker, VanNest & Peters, on behalf
19 of the Honda entities.

20 So the first Honda objection at issue is docket
21 number 1598, which deals with the Special Master's order
22 compelling Honda to produce data relating to its all-terrain
23 vehicles and side-by-sides. And so the issue here is whether
24 Honda should be forced to produce the same massive set of
25 data that it has agreed to produce for its automobile

1 business for its separate and much smaller ATV and
2 side-by-side business. And this request for ATV and
3 side-by-side data is made only by the truck and equipment
4 dealer plaintiffs, which they contend is relevant to the
5 truck and equipment cases, so this is not at issue in the
6 larger auto parts cases.

7 Now, the truck and equipment case seems to me to be
8 primarily focused on trucks and heavy equipment, large trucks
9 and heavy equipment like tractors or they've said mining
10 equipment and other things like that. And I think for this
11 reason, ATVs and side-by-sides were never front and center in
12 any of the briefing that was before the Special Master and
13 they weren't front and center in the subpoena. So the
14 Special Master --

15 THE COURT: But isn't the issue were they included
16 in the definition in the subpoena?

17 MS. SESSIONS: Yes, Your Honor, I think that's one
18 of the two issues here, and we contend that they are not
19 included within the definition of vehicle in the subpoena.
20 But we also contend that this request for ATV and
21 side-by-side data was not actually raised in the motion to
22 compel that was brought before the Special Master. This was
23 raised only at the hearing after briefing was complete on the
24 motion to compel, and for that reason there was no record
25 from which the Special Master could make the required

1 findings that this request was proportional to the needs of
2 the case because there was no briefing on that issue.

3 But to get to Your Honor's question about the
4 definition within the subpoena, so the subpoena has two -- a
5 two-part definition of vehicle. There is a definition that I
6 think generally applies to the auto parts cases, which is an
7 automobile or other motor vehicle that is primarily used for
8 transporting from one to eight passengers and is designed to
9 operate primarily on roads, and there are some examples of
10 those. I don't think there's any dispute that ATVs and
11 side-by-sides are not designed to operate primarily on roads
12 and do not fall within that portion of the definition.

13 There is a second half of the definition that is
14 specific to certain truck and equipment cases, and that is
15 the second sentence of the definition which is in addition,
16 to the extent that any of the requests seek documents with
17 respect to wire harness systems or bearings, vehicle also
18 includes medium-duty trucks, heavy-duty trucks, buses,
19 commercial vehicles, construction equipment, mining
20 equipment, agricultural equipment, railway vehicles and other
21 similar vehicles.

22 So the truck and equipment dealers contend that
23 their request for ATV and side-by-side data falls within this
24 second portion of the definition.

25 THE COURT: Do you define an ATV as agricultural?

1 MS. SESSIONS: We do not, Your Honor. I think
2 that's one of the two issues with this definition. So, first
3 of all, this definition applies only to wire harnesses and to
4 bearings, and the truck and equipment dealers have withdrawn
5 their requests with respect to bearings documents and I
6 believe that they have as well with respect to wire harness
7 documents, but they are trying to apply this to other parts
8 as well even though the definition is explicitly limited to
9 wire harness and bearings.

10 But even if the definition were not so limited and
11 swept in other parts categories, ATVs and side-by-sides would
12 still not be agricultural equipment under this definition.
13 An ATV -- ATVs and side-by-sides are -- they are small -- I
14 sort of think of an ATV almost as a sort of motorcycle with a
15 bigger frame around it one or two people can ride on, people
16 often go off-roading in them and you can ride around in the
17 woods, use it for a variety of purposes. And a side-by-side
18 is similar but it often has a sidecar in it so a passenger
19 can ride next to you.

20 These are not in any way similar to the other types
21 of heavy trucks and equipment that are listed in this
22 definition; buses, commercial vehicles, construction
23 equipment, mining equipment, they don't look anything like
24 that. They are not heavy agricultural equipment either, they
25 are not tractors or combines or things like that that you

1 would expect to be lumped together with construction
2 equipment and mining equipment and other heavy trucks.

3 As we set forth in our brief, the National Highway
4 Transportation Safety Administration has a definition of
5 agricultural equipment which also would not include things
6 like ATVs and side-by-sides; that definition is tractors,
7 self-propelled machines such as beet harvesters, combines,
8 bailers or other implements that are primarily designed for
9 agricultural field operations. ATVs and side-by-sides are
10 not primarily designed for agricultural field operations.

11 And the only evidence in the record in support of
12 the truck and equipment dealers' argument that ATVs and
13 side-by-sides are, in fact, agricultural equipment is this
14 one picture that they presented during the hearing to the
15 Special Master, which wasn't in their briefing and wasn't
16 otherwise made a part of record, which shows an ATV in a barn
17 with some baling wire on the back of it, and this does not
18 make an ATV agricultural equipment. Just because it can be
19 parked in a barn or it might be used on a farm doesn't mean
20 it is something like a tractor or a combine or a harvester.

21 THE COURT: There's nothing in your literature that
22 shows -- that says it is an agricultural or could be used as
23 agricultural?

24 MS. SESSIONS: So the picture that they found is a
25 picture from a Honda website so --

1 THE COURT: A picture is worth a thousand words.

2 MS. SESSIONS: Well, but, Your Honor, the fact that
3 this thing was pictured in a barn just doesn't make it
4 agricultural equipment. So I don't have a lot personal
5 experience with this, I grew up in the city, but my husband
6 grew up on a farm in Nebraska, and so I asked him -- they
7 didn't own an ATV so he couldn't tell me whether they used an
8 ATV for farm purposes, but he did park his bicycle in the
9 barn. So if you had taken a picture of his barn, his bicycle
10 would have been in there. And sometimes he rode his bicycle
11 around the farm to do various farm-related tasks. The fact
12 that it lived in the barn and that he used it on the farm
13 doesn't make his bicycle agricultural equipment any more than
14 using your sedan on a farm doesn't make it agricultural
15 equipment. So this picture doesn't really prove the point
16 that the ATVs and side-by-sides fall within this definition.

17 And Your Honor may be wondering why this is such a
18 big deal and why we are fighting this request for ATV and
19 side-by-side data and why it matters that it wasn't in the
20 subpoena. And the answer is because the additional burden to
21 do this is significant. As I mentioned at the outset,
22 Honda's ATV and side-by-side business is separate from its
23 passenger vehicle business, so all of the work that we've
24 done so far and the hundreds of hours that we have spent
25 interviewing witnesses and collecting documents doesn't --

1 wouldn't apply to the ATVs and side-by-sides. We would have
2 to undertake an entirely new collection process with a
3 different set of purchasing folks and a different factory in
4 South Carolina rather than in Ohio where our passenger
5 vehicle purchasing folks are located. So it is a significant
6 additional burden, but the Special Master didn't weigh that
7 burden and didn't assess proportionality because none of that
8 was in the record before him because this issue wasn't
9 briefed to him because it wasn't raised in the original
10 motion to compel, it was only raised as sort of an
11 afterthought at this hearing.

12 And for that reason, we would ask that Your Honor
13 overturn the Special Master's order compelling production of
14 that data.

15 Thank you.

16 THE COURT: Okay. Thank you. Plaintiff.

17 MR. SHOTZBARGER: Good afternoon, Your Honor.
18 William Shotzbarger of Duane Morris for the truck and
19 equipment dealer plaintiffs.

20 Your Honor, we are requesting that the Court affirm
21 the Special Master's order on Honda's ATVs and side-by-sides.

22 THE COURT: What standard do I use?

23 MR. SHOTZBARGER: So that was going to be my first
24 point, Your Honor. This standard is an abuse of discretion
25 standard. This is a procedural matter under Rule 53(f)(5),

1 and you need only look at Honda's own objections because if
2 you look at their objections, you'd go to the controlling or
3 most appropriate authorities section required by the local
4 rules but there for a reason. When you look there, they list
5 Rule 26, Rule 45, Rule 53, and then one case, the Blue Cross
6 Blue Shield of Michigan case, which interprets those Federal
7 Rules of Civil Procedure. So therefore the proper standard
8 of review is an abuse of discretion.

9 Moving to the merits, Honda's objection should be
10 overruled for three reasons. First, Honda cannot dispute
11 that it markets these vehicles for agricultural uses. The
12 term agricultural vehicle appeared in the subpoena itself and
13 it appears in all of the truck and equipment dealer
14 plaintiffs' complaints.

15 The second reason is that our complaints in the
16 radiators, starters and alternators actions specifically list
17 ATVs in the definition of vehicle or trucks and equipment
18 that we used in those complaints. And the reason that's
19 important is because when the subpoena was first served in
20 August 2015, we had not filed in radiators, starters or
21 alternators yet. And so therefore as the subpoena was served
22 and everyone understood that it was kind of a growing,
23 amorphous subpoena to encompass later-filed cases, when we
24 filed our future complaints, we directed Honda to look at our
25 later complaints as opposed to the definition of vehicle that

1 was in the subpoena served before we filed in those later
2 cases.

3 And the third reason the objection should be
4 overruled is that Honda has failed to substantiate its claim
5 of excessive burden.

6 I want to move to a little bit of the procedural
7 history and that is because Honda was always on notice that
8 the truck and equipment dealer plaintiffs were seeking ATV
9 and side-by-side related information from Honda. Now, we
10 first moved against Honda back in January 2016. The serving
11 parties told Honda that we were moving to compel with respect
12 to all auto parts at issue in the multi-district litigation,
13 so not just bearings, not just wire harnesses, but all the
14 parts that the truck and equipment dealers were in at that
15 time, and that's in a letter dated January 13th, 2016,
16 ECF Number 1186, Exhibit P at page 2.

17 Honda was always on notice that the truck and
18 equipment dealer plaintiffs were moving with respect to the
19 same prioritized requests for OEMs that were involved in
20 trucks and equipment manufacturing, and Honda was always one
21 of those, at least we told them they were, regardless of what
22 they say. And all of this procedural history was a result of
23 the parties, both the plaintiffs and the defendants,
24 cooperating together after we were instructed by the Court to
25 do so.

1 Now, with regard to specific discussions between
2 Honda and the truck and equipment dealers, we had discussions
3 between May 2016 and November 2016. We constantly asked
4 Honda to produce information, data, anything about their
5 burden with regard to production of information for ATVs and
6 side-by-sides. They hardly responded to us despite multiple
7 questions over multiple meet-and-confer calls. And it had
8 been clear, as Ms. Sessions mentioned, that they were
9 certainly focused on the passenger car side.

10 Now, all this back and forth, and I say all of this
11 but it really wasn't that much, this culminated -- the
12 culmination of our discussions was the November 4th, 2016
13 letter from the truck and equipment dealers to Honda; this is
14 ECF Number 1616-2. We laid everything out leading up to the
15 renewed motion to compel. We were teeing up the motion. We
16 never got a response to the letter from Honda.

17 Now, in that letter we laid it all out. We said,
18 first, Honda markets these vehicles for agricultural uses,
19 hence the picture of the side-by-side that was used at oral
20 argument before the Special Master. This is a Honda picture.
21 It is from hondanews.com. They created it. I'm not sure why
22 they are so upset that it was used at oral argument. It is
23 their own marketing --

24 THE COURT: They were just parking it in the barn.

25 MR. SHOTZBARGER: It is their own marketing

1 material. Now, it is clear that they are marketing this as
2 an all-terrain vehicle, that's what it is. You can use it
3 for more than one use. Sure, you can ride it on the beach,
4 but you can certainly put a fence up at the ranch with it.
5 So that is why they market it in that fashion, so they can
6 sell more of them, because after all, it is a utilitarian
7 vehicle.

8 And to go to that point, in our complaints in
9 radiators and starters and alternators, we specifically say
10 ATVs marketed for agricultural uses, and that is exactly what
11 that picture shows.

12 Now, the reason we look to those complaints, like I
13 said, is because we filed in those cases after the subpoena
14 was originally served, and Honda was on notice that we were
15 moving with respect to all the parts at issue and all the
16 cases in which the truck and equipment dealers are in, which
17 is not that many cases. As Ms. Sessions mentioned, we have
18 only -- we've withdrew the request for wire harnesses and
19 bearings, and so that only leaves occupant safety systems,
20 radiators, starters and alternators. So that's only four
21 parts that they need to go get the information for from the
22 manufacturing plant in South Carolina that we never even
23 heard about until we got here in December to hold argument.
24 They never he responded to our letter. They never let us
25 know what the burden was before we got here in December

1 before the Special Master.

2 With regard to the definition in our own complaint,
3 as the truck and equipment dealer plaintiffs, we are the
4 masters of our complaint, we are the ones who are able to
5 interpret that definition. That principle comes from Holmes
6 Group vs. Vornado; that's a U.S. Supreme Court case cited in
7 our brief.

8 So in sum, they never responded to our letter so we
9 moved to compel, and that's how we wound up here.

10 Some final points. It is interesting how the OEMs
11 have constantly complained that this is the broadest subpoena
12 in history, yet somehow ATVs and side-by-sides are not
13 included in the subpoena. Hardly anyone but Honda has
14 questioned the subpoena's breadth until now, and we submit
15 that the definition certainly includes ATVs and
16 side-by-sides.

17 These vehicles are not de minimus to the truck and
18 equipment dealer plaintiff class. By our own admission, the
19 class is not going to be as big as the passenger car classes
20 with the auto dealer plaintiffs and the end payor plaintiffs.
21 Still, Honda sold 1.9 million ATVs over the bearings class
22 period, so that is not de minimus, that is a lot of vehicles,
23 economists aside. We have dealt with truck and equipment
24 subpoena recipients selling vehicles in the tens of
25 thousands, but here we are talking about Honda, one of the

1 biggest OEMs, one of the lead six OEMs, and in the ATV sphere
2 they sold 1.9 million ATVs and side-by-sides over the class
3 period.

4 And one final point, we have evidence that Honda
5 ATVs, not just ATVs in general but Honda ATVs were affected
6 by the conspiracy, and so therefore, in order to represent
7 the class, we request that the Court affirm the Special
8 Master's order.

9 THE COURT: Thank you. Ms. Sessions.

10 MS. SESSIONS: Briefly, Your Honor, on the standard
11 of review, you have heard a lot about the standard of review
12 on a lot of these issues. Findings of fact or conclusions of
13 law of the Special Master are reviewed de novo, and only
14 procedural matters are reviewed for an abuse of discretion.
15 We would submit that the Special Master's conclusions, such
16 as they were, that ATVs and side-by-sides were included
17 within either the motion to compel or the subpoena would be
18 mixed questions of fact and law that should be reviewed de
19 novo. But even if the standard of review is abuse of
20 discretion, I think there is ample evidence that the Special
21 Master did unfortunately abuse his discretion in this case.

22 Briefly, as to the argument that ATVs are mentioned
23 in certain of the complaints that the truck and equipment
24 dealers filed, that's really beside the point because the
25 subpoena doesn't purport to incorporate any definition from

1 any complaint and it doesn't point to the complaints at all,
2 and it is not a non-party's obligation to go out and inspect
3 other pleadings on the docket to help it interpret the
4 subpoena that it has been served with. The definition that
5 governs is the definition that they supplied in the subpoena,
6 which does not mention ATVs and is specific only to wire
7 harnesses and to bearings.

8 There is no doubt that we had discussions prior to
9 the renewed motion to compel about this issue of ATVs and
10 side-by-sides. That's why we were surprised when this issue
11 wasn't raised in the actual motion to compel itself. The
12 letter that was sent to Honda was attached to the motion to
13 compel, but the motion, the memorandum of points and
14 authorities and then the Honda-specific declaration that laid
15 out all of the disputes between the parties does not mention
16 this issue of ATVs and side-by-sides. So we had understood
17 that this issue had been dropped by the time of the renewed
18 motion to compel because it didn't show up in that motion.

19 As to the burden argument, it is true that there
20 are only four parts now at issue in the truck and equipment
21 dealer plaintiffs' complaints for which they are seeking
22 documents from us, but that doesn't mean that our production
23 is limited only to those four parts because they are also
24 seeking significant downstream discovery that applies to any
25 ATV no matter what parts went in it.

1 And last is the argument that this is not de
2 minimus. Our problem here is that there has been no showing
3 of the relative size of Honda's ATV or side-by-side sales and
4 production relative to ATVs and side-by-sides in general or
5 to the class that the truck and equipment dealer plaintiffs
6 seek to represent which includes a lot of other kinds of
7 equipment.

8 In our brief we set forth the numbers. We showed
9 that Honda has produced about 1.9 million ATVs during this
10 time period, ten percent of which were exported. In
11 response, we would have expected some argument or showing
12 about what proportion of the relevant market this would make
13 up, but no such evidence has been submitted to Your Honor.
14 Aside from just saying this is important or it is not de
15 minimus, there is no actual evidence that was presented to
16 the Special Master or to you about what the actual importance
17 of this data is. And Your Honor recognized in a slightly
18 different context with the smaller OEMs for their vehicle
19 business that they might be differently situated and that
20 that discovery might be held in abeyance while things were
21 worked out with the larger OEMs. And similar logic might
22 apply here if we actually knew what portion of the market we
23 were talking about, but the truck and equipment dealer
24 plaintiffs have declined to provide any such information and
25 they just say, well, it is not de minimus. That's not a

1 sufficient showing to demonstrate that their discovery
2 requests meets the basic requirements of Rule 26
3 proportionality.

4 Thank you.

5 THE COURT: All right. On this issue, it seems to
6 me that it is a procedural matter because it is whether these
7 ATVs and side-by-sides are covered in the subpoena, and the
8 Master made a ruling. The Court looks at that ruling.
9 Clearly this information is relevant, nobody is really
10 arguing that, and it is something that can be produced so
11 there's no issue of how to interpret the subpoena. And
12 actually if this were de novo, I would probably do the same
13 thing.

14 Is it de minimus? We don't know all of the numbers
15 to say compared to -- compared to what, the cars, whatever,
16 but I think that it is significant enough that it should be,
17 in fact, turned over. Clearly, the ATV and side-by-side -- I
18 think it is rather amusing this picture in the barn, I like
19 that, but it could be used for farming, but clearly it was
20 one of those things that were listed and Honda was on notice
21 that this included the ATVs and the side-by-sides. So the
22 Court is going to affirm the Master's order. Okay.

23 Next, let me --

24 MS. SESSIONS: Your Honor, while I'm up, should we
25 do Honda's other objections or --

1 THE COURT: The other motion, yes. Let me just get
2 the document first.

3 MS. SESSIONS: Sure.

4 THE COURT: That's the January 19th.

5 MS. SESSIONS: I believe it is January 19th.

6 THE COURT: I think that's what it is. Okay.

7 MS. SESSIONS: So this is Honda's objections to the
8 Special Master's January 19th order, and Honda's objections
9 are limited just to one issue, which is the order to produce
10 CSS or cost simulation system data for intermediate model
11 years rather than just for major model changes.

12 Honda has already agreed to produce the CSS data
13 for major model changes. And a major model change is every
14 three to five years Honda will make design changes to a
15 model, and that's when most of the part design and part
16 sourcing changes for a model, and Honda has already agreed to
17 produce that data.

18 But the dispute is whether those intermediate years
19 of data need to be produced. And it is unnecessary to
20 require Honda to go through the additional burden of
21 producing that data because the data about sourcing and parts
22 costs can already be found in other data that Honda has
23 agreed to produce.

24 So the CSS data, as I mentioned, is from Honda's
25 cost simulation system, so it shows estimated part costs.

1 When part costs are actually finalized, when a quote is
2 accepted from a supplier and then that part goes into mass
3 production, those data are reflected in other places, and
4 Honda has agreed to produce that data.

5 So the end payors said that they wanted this
6 intermediate CSS data because part sourcing can change during
7 a model refresh cycle outside of a major model change. And
8 while that does happen, although it is rare, the end payors
9 can find that data in the other sources that Honda has agreed
10 to produce. For instance, Honda has agreed to produce and
11 has already produced a significant amount of its E-quote data
12 which shows the actual quotes that Honda got back from
13 suppliers and then which quotes were approved and Honda --

14 THE COURT: Didn't a witness who testified say that
15 data comes after production like 18 to 24 months?

16 MS. SESSIONS: So the E-quote data doesn't all come
17 after production. So a quote is finalized before --
18 immediately before a vehicle goes into production. So there
19 is also cost management system data that may be what the
20 parties were referring to, but Honda's 30(b)(6) --

21 THE COURT: You read what they said in their brief
22 about that?

23 MS. SESSIONS: Yes. Honda's 30(b)(6) witness
24 testified that every time there is a design change, so
25 whether that be for a major model or a minor model change or

1 an intermediate model change, there is going to be a new
2 drawing issued and a new quotation issued, and when that new
3 quotation is responded to, that that data will go into
4 E-quote. So anytime there is a design change, that quotation
5 and the approval of that quotation will be reflected in
6 E-quote, so a change in supplier or a change in the price of
7 a part will be reflected in the E-quote data.

8 And I would note that the serving parties have had
9 at least some of Honda's E-quote data for over a year, and
10 they haven't come back to us and identified a gap in that
11 data that they think needs to be filled with intermediate
12 cost simulation system data.

13 After Honda pointed out that the identity of a
14 supplier and the price at which a part is supplied can be
15 gleaned from the E-quote data that Honda is producing, the
16 end payors then argued, well, the CSS data is also otherwise
17 relevant to Honda's pricing policies and to passthrough. But
18 the serving parties took the deposition of Honda's 30(b)(6)
19 witness on vehicle pricing and he testified that Honda does
20 not use the CSS data when it is setting vehicle prices. He,
21 in fact, didn't know what CSS is. For the most part, Honda
22 uses actual cost data, not simulated cost data, so cost data
23 that would come from E-quote or from Honda's other cost
24 management systems. And then to the extent that Honda is
25 doing pricing projections before setting the final price and

1 before a vehicle has been in mass production, Honda uses
2 aggregated cost data, not part by part cost data, to do that,
3 and we have agreed to produce the aggregated cost data that
4 Honda's pricing folks use when they are doing what's called
5 imaging around what the final price of a vehicle might be, so
6 we are giving them exactly what the pricing department
7 already uses.

8 Now, the serving parties have also made the
9 argument that Honda should just produce this because the
10 burden is not qualitatively different than the burden imposed
11 by the CSS data that we have agreed to produce. And I agree
12 the burden is not qualitatively different because it is the
13 same data, but that doesn't really answer the question of
14 what the burden is because there is no question that
15 generating additional reports and generating additional data
16 is going to require additional work for Honda. And three to
17 five times more reports would have to be generated if we are
18 going to do those intermediate years, and there is just no
19 reason to order that production and to order Honda to bear
20 that burden when this information can be gleaned from other
21 sources.

22 THE COURT: Okay.

23 MS. SESSIONS: Thank you.

24 THE COURT: Counsel.

25 MS. CASSELMAN: Good afternoon, Your Honor.

1 Jill Casselman, Robins Kaplan, on behalf of the end payors.

2 I would like to address three points about
3 counsel's argument and also another that was mentioned in
4 their papers.

5 First, I want to talk about the relevance of the
6 CSS data. Now, Honda has argued that we don't really need
7 this data, that we are basically just arguing for cumulative
8 data, more data for more data sake. That's not true. We
9 were very conscientious when we determined which items of
10 data to pursue and which to give up because there's so much
11 data that needs to be produced in this case. CSS data for
12 mid-model changes is very important to us, and it's important
13 because we talked to our experts about what kind of
14 passthrough model is going to look like, and when you have
15 more data, your model is better. The reason why we need
16 mid-model change, not just major model change, is because
17 major model changes, as counsel said, happen only every five
18 years, right.

19 So if you look at the Honda Accord, which is a very
20 popular vehicle in the United States, many, many vehicles at
21 issue in this class are Honda Accords, their mid-model --
22 their major model changes, excuse me, would have happened in
23 2007 relative to -- sorry, let me step back.

24 Ten years of data is what Honda has reasonably
25 accessible; we know that, it's not disputed, ten years go

1 back. So if you look back in 2007 for the major model change
2 of a Honda Accord, the CSS data that models those pricing
3 decisions would have been maybe in 2005, 2006; it is outside
4 the ten years. So we are not going to have Honda Accord
5 data, CSS data, for the first few years of our ten-year
6 period. That's bad. We need to be able to model passthrough
7 effectively using the CSS data.

8 So why is CSS data not duplicative of E-quote and
9 accounts payable? E-quote are bids, like that is what -- the
10 bids that have been accepted go into the system. But those
11 are not the prices that end up being used to make pricing
12 decisions because E-quote data, that often changes and those
13 changes come later after the bid is won. We need E-quote
14 data, and it is very helpful that Honda is going to provide
15 it because it shows bid rigging; it does not help us with
16 passthrough.

17 So accounts payable, which is the amount of total
18 payments made to suppliers for certain orders for certain
19 time periods, is also useful, but we can't use it to track
20 specific vehicles or specific parts because there is -- it is
21 subject to rebates or discounts and credits and so we can't
22 get a price per part. The CSS data, because it is modelling
23 these expected or forecasted costs, can do that, and so we
24 need that data for this purpose to show that Honda passed on
25 overcharges to customers. This is the critical piece for

1 that.

2 THE COURT: Now, you had the CSS data for the
3 mid -- what do you call it, or the minor model changes?

4 MS. CASSELMAN: Yes. So there's actually no
5 difference for our perspective for major and mid-model
6 changes. They are both incredibly important because
7 manufacturers, OEMs like Honda -- and I should note Honda is
8 the only OEM that's objecting to this data -- it is
9 relatively rare that they are making pricing decisions like
10 this, that they are forecasting what the pricing will be. So
11 to us, we need as much of that data as we can to show the
12 decisions and in as a robust of a manner as we can. It is
13 not speculative, it is not overreaching. We know that we
14 need it because we have to show passthrough for our class.
15 And so it is -- you know, the Special Master understood this,
16 we argued this, and he found that it was proportional to the
17 needs of this case, a very big case, and Honda is a very big
18 OEM.

19 I think it is interesting this is the hill that
20 Honda wants to fight on because it is just a -- it is such an
21 important piece of our case. And the distinction between
22 major and other model changes is not what's relevant, there
23 is no significant difference between the two.

24 And to the effect that counsel raised burden, you
25 know, this Court has -- this Court and Special Master have

1 ordered 70 percent cost sharing for this reason, to help
2 alleviate the burden of doing this work that we know they
3 have to do. Honda has claimed no special or qualitatively
4 different burden, it is just more work. And as their
5 30(b)(6) witness testified, this CSS data is readily
6 accessible; you just put a disk into the computer and you
7 pull it out. And granted, that would take someone some time,
8 but we are going to be helping them with that burden to make
9 it not as substantial. And, you know, Mr. Willoughby, who is
10 the 30(b)(6) witness I'm referencing, you know, he said this
11 is something we can do, it is not difficult.

12 So I would just like to raise one more issue that
13 was discussed at the -- in the papers, not here today, this
14 contention that somehow the parties had waived this issue.
15 It has always been requested in all of our briefs, we haven't
16 changed on that. And when we were here at the hearing, we
17 were attempting to work with our expert to see if we could
18 forego any amount of data that would make the burden less on
19 Honda, but we couldn't because of the reasons we've
20 discussed. So it is just a mischaracterization to suggest
21 that we had an agreement and then we reneged on that
22 agreement. That is absolutely not what happened here.

23 We need this data, it is relevant, and Honda
24 doesn't dispute that it is relevant. They just claim it is
25 burdensome, which we don't think that they have shown any

1 abuse of discretion on the part of the Special Master. So we
2 respectfully submit that the objection should be overruled.

3 Thank you.

4 THE COURT: Okay.

5 MS. SESSIONS: Your Honor, it's been argued that
6 E-quote is insufficient because it just shows bids, but
7 E-quote actually shows more than that. E-quote shows the
8 bids that were received and then adjustments to that bid
9 price and then whatever the final price is. So there is
10 actually -- there are two columns in E-quote, one that shows
11 a change to a bid price and a reason code column which
12 actually shows why the bid price was adjusted, and that might
13 be because of a change in raw material costs or something
14 else that affected the price at which the supplier is
15 actually going to supply the part, so E-quote does show more
16 than just initial bids.

17 It was also argued that CSS is needed because
18 E-quote and accounts payable don't include rebates. We have
19 given rebate -- or given or agreed to give rebate data, which
20 isn't necessarily done on a part-by-part basis, but CSS
21 certainly doesn't show rebates or any sort of after-the-fact
22 adjustments to price because those are just prices that are
23 projected prior to production of the vehicle. And that's
24 really the important point here is that it is unclear why CSS
25 is relevant to passthrough when the simulated cost doesn't

1 reflect any costs that Honda has actually incurred. The
2 costs that Honda incurs and theoretically might be passed on
3 to a consumer are the costs that are reflected in the E-quote
4 data and the accounts payable data because those are the
5 amounts that Honda actually pays, not the forecasted costs.
6 And when the price of the vehicle is set, CSS is not used to
7 set that price. When there's thinking about price setting
8 going on prior to that final MSRP being agreed on, Honda
9 doesn't do that by looking at individual part data but it
10 looks at aggregate cost data that comes out of CSS, but we
11 have agreed to produce those reports generated out of CSS
12 that aggregate the projected cost data. And then when the
13 final price of the vehicle is set, that set used -- that set
14 based on actual cost data, not projected costs, that would
15 come out of CSS.

16 And in terms of the burden, it is not as simple as
17 putting a disk into a computer and just pulling it out again.
18 The data does exist, it can be generated, we don't deny that,
19 but Honda's 30(b)(6) witness explained that it is not in a
20 readily digestible form. What Honda has to do is go into
21 that database and write a program to generate an Excel
22 spreadsheet so that the data is reasonable and
23 comprehensive -- is readable and comprehensible for someone
24 else, and that process takes time. And it is not time that
25 Honda can't spend, but it is time that Honda would really

1 rather not spend given the already massive amount of data
2 that Honda has already agreed to produce.

3 THE COURT: Honda already has a program to get the
4 CSS data obviously because you say you have given it to them,
5 so what would be the burden on having it for the minor model
6 changes?

7 MS. SESSIONS: I think I misspoke when I said
8 program. I didn't mean to suggest that someone has gone and
9 written some code to extract it. From my understanding, this
10 is done pretty manually. There is one person who has been
11 responsible for doing this, for responding to these requests
12 at Honda, and she goes into the system and makes the
13 appropriate queries and asks the database to generate an
14 Excel file that then -- that's been tossed out, and then that
15 file needs to be checked because the data is not as clean as
16 one might necessarily hope that it would be. So it takes
17 some time for this person to then go look at these reports
18 and make sure that there is nothing weird that happened with
19 the data that came out of it, because we did have to go back
20 and forth a few times when we were generating the first set
21 of CSS reports.

22 THE COURT: Okay. Thank you. Again, this is a
23 request that requires the Court to look at the Master's
24 ruling and to decide whether it should be affirmed or not by
25 the standard of abuse of discretion. And the Court in

1 looking at that considered the fact that there was much
2 discussion and I saw some of the deposition of the witness of
3 Honda, and clearly the CSS data is very relevant and
4 important to the plaintiffs in determining their passthrough,
5 and the Master considered whether it was proportional to the
6 needs of the case and determined that it was.

7 So though I do understand what the defendant --
8 well, what Honda is saying in this case, that this
9 information or much of this information is already being
10 given through other programs to the plaintiff, I do see the
11 necessity to be complete and to give the mid-model
12 information to them also. So I just can't find that it is an
13 abuse of discretion. It may be overkill to some extent, but
14 I don't find it as an abuse of discretion, so therefore I
15 affirm the Master.

16 Okay. Next we have Toyota.

17 MR. SCHAPER: Good afternoon, Your Honor. Michael
18 Schaper from Debevoise & Plimpton from the Toyota entities.

19 This is Toyota's objection to one part of the
20 Special Master's January 4th, 2017 order, and compared to
21 what you've heard today, Your Honor, I will be brief.

22 THE COURT: Okay.

23 MR. SCHAPER: The Special Master ordered the OEMs
24 to produce information related to non-defendant suppliers
25 without regard to whether the parties actually need that

1 information with respect to each non-defendant supplier and
2 without, in our view, sufficient confidentiality protections
3 for those non-defendant suppliers' information.

4 As a backdrop, Toyota is obligated by contract to
5 its suppliers to keep their information confidential and not
6 to disclose it to any third parties without a final
7 non-appealable court order. We would think that the
8 defendant suppliers surely appreciate that protection because
9 were the shoe on the other foot so to say, we would stand up
10 for them in the same way and try to protect their information
11 that we hold as an OEM.

12 THE COURT: The interesting thing is that wording,
13 a final non-appealable court order. I mean, do you really
14 mean that, because it is not appealable until the case is
15 over? It would take care of the issue I guess.

16 MR. SCHAPER: Well, I think that's an issue for
17 another day, Your Honor, but surely we were able to appeal
18 the Special Master's decision to Your Honor.

19 THE COURT: Yes. Okay.

20 MR. SCHAPER: Toyota had two concerns with the
21 Special Master's order, and the first I think I can say
22 appears to have been resolved through the briefing before
23 Your Honor, and that was that without knowing exactly which
24 non-defendant suppliers' information would be responsive to
25 the subpoena, there would be no way that the parties could

1 actually say whether they need it until we had told them
2 which non-defendant suppliers' information was at issue. And
3 we felt that instead of waiting to see whose information was
4 at issue and conferring with the parties as to whether they
5 feel like they need that non-defendant suppliers'
6 information, we felt like the Special Master's order would be
7 just telling us to go notify the non-defendant suppliers that
8 it is all going to be produced. And the parties appear to
9 have agreed in their opposition brief that it may be that
10 they don't need every non-defendant suppliers' information,
11 and they appear willing to discuss that issue further with
12 Toyota once we know exactly which non-defendant suppliers are
13 at issue, and this could be hundreds of non-defendant
14 suppliers. We think it is roughly 18 just between AVRP and
15 bearings, and, of course, there are many other parts
16 categories at issue. So just the process of Toyota notifying
17 each of them and engaging with them on their questions would
18 have taken a lot of information. But we do think that the
19 parties' willingness to engage with us on that alleviates the
20 concern of us having to give a blanket notice to all
21 non-defendant suppliers.

22 And we also appreciate that the Special Master's
23 order does provide non-defendant suppliers with the ability
24 to come object to their information being produced should
25 they choose to do so.

1 And that leaves one issue, Your Honor, and that
2 concerns protecting the confidentiality of the non-defendant
3 suppliers' information. The information that will be
4 produced includes their price quotes, the actual prices they
5 charged Toyota and were paid by Toyota, and this is highly
6 commercially sensitive information just on its own and also
7 because it is being produced in a case where its competitors
8 are parties, so there is real sensitivity there. And so
9 Toyota had proposed that it should be able to produce the
10 information while disguising the names of the non-defendant
11 suppliers, so bearings supplier one, bearings supplier two,
12 and it could do so in a way that is uniform across its data
13 so that it would be apples to apples when the parties were
14 looking at the data.

15 The parties resist that suggestion and they say --
16 they claim that their experts will need to know the actual
17 identity of the non-defendant suppliers in order to make use
18 of the information, but they don't put any meat on the bones
19 of that suggestion and they don't really provide a rationale
20 for why they would need the specific names. And we think
21 that that's insufficient to warrant turning over very
22 commercially sensitive data of non-defendant suppliers who
23 are not in any part related to this case without that
24 additional protection, so we think that should be added to
25 the order.

1 THE COURT: Okay. Thank you.

2 MR. HEMLOCK: Good afternoon, Your Honor.

3 Adam Hemlock, Weil, Gotshal, on behalf of the Calsonic and
4 Bridgestone defendants, and I will be speaking for the
5 serving parties in response to Toyota's argument.

6 First, to be clear, Toyota is the only OEM that has
7 raised this concern about whether it needs to get approval
8 from its non-defendant suppliers before it produces data and
9 documents relating to Toyota's purchases from those entities.
10 None of the other OEMs raised this issue and none of them
11 have joined Toyota.

12 So my first point is, is there something unique or
13 special about Toyota's position vis-à-vis its relationship
14 with its suppliers that's somehow different from the five
15 other OEMs that are part of this proceeding that don't seem
16 to have the same degree of concern.

17 The law here is clear, Your Honor. Lots of courts
18 have said that discovery in the federal rules, under the
19 federal rules, discovery in a civil case like this trumps
20 confidentiality provisions and agreements, and that makes
21 perfect sense because one can imagine how difficult it would
22 be to engage in discovery if you could merely overcome that
23 by saying well, there is a confidentiality restriction in
24 that agreement or we had an NDA and documents were exchanged
25 pursuant to that so we can't produce any of that in

1 discovery.

2 Toyota cited two cases in support of its position.
3 The Insulate America case where there the court questioned
4 the relevance of the discovery at all, and frankly the
5 parties themselves had questioned the strength of the
6 protective order that was entered in that case, and here we
7 don't have either of those concerns. The protective order in
8 this case -- obviously there are many cases but they are
9 all -- all the protective orders, to my understanding, are
10 pretty much the same; they are robust, they are protecting
11 lots of confidential information. There's no reason to
12 question that they won't be effective here with respect to
13 the information on Toyota's purchases.

14 The other case that Toyota cited was Vitamins, and
15 there that squarely addressed trade secrets. And trade
16 secrets is a unique special category of discovery, it is
17 specifically referenced in Rule 26 and something that does
18 deserve perhaps in certain circumstances separate treatment.
19 But there's no dispute here, Your Honor, we are not talking
20 about trade secrets. We are really just talking about the
21 transactional data and information regarding to the parts
22 that Toyota buys.

23 Now, I'm not going to say that it is something that
24 should be public, and, of course, I respect and appreciate
25 Mr. Schaper's point that we as suppliers to Toyota and others

1 also would appreciate and would care about that
2 confidentiality. But in this particular case we believe that
3 what's appropriate is to do what you do in any other case:
4 produce it, make it highly confidential, we can make it
5 outside counsel only. There is no reason why there needs to
6 be an additional step beyond what the federal rules already
7 anticipate with respect to this type of discovery. So that's
8 my next point.

9 You know, Toyota talks about this being sensitive
10 information, but what is it that is unique about this
11 particular information? Again, just transactional data and
12 documents about buying parts, that's separate and different
13 from lots of other confidential and sensitive information
14 that's sought in third-party discovery in cases all across
15 the country. We are not talking about the Coke formula. And
16 Toyota hasn't really in its papers tried to explain why its
17 purchasing data and the documents related to it is somehow
18 unique or special, that the federal rules don't really
19 account for it and figure out a way to alleviate the concerns
20 of its non-defendant suppliers.

21 I would note, Your Honor, that the Special Master
22 had ordered production of certain DMS data from Honda. This
23 was data that Honda had received from certain of its auto
24 dealers and they had provided that data to Honda, and the
25 serving parties had been seeking that data and there was a

1 back and forth about whether Honda should be required to
2 produce it, and you may recall that the auto dealers had
3 objected to that. Well, the Special Master figured that out.
4 He looked at the standard for third-party discovery and he
5 ultimately said, well, they should be given notice, and sure
6 enough, Honda provided notice to all of those auto dealers
7 who had information that was going to be produced by Honda,
8 and they were given an opportunity to come and object, and
9 that's exactly what we think should happen here. Notice is
10 enough. They should be able to come in, if they have a
11 concern about it they can object, and Your Honor or Special
12 Master Esshaki can figure it out.

13 Finally, I would just note there is again a bit of
14 a policy concern here which is we have the federal rules, we
15 have a system in place that accounts for how to deal with
16 this situation, but the OEMs in this and in other
17 circumstances have endeavored to add more. And one of the
18 concerns here is that by doing so, it is going to require
19 coming back to this Court again and again to try and work
20 this out. What is going to happen if we proceed as Toyota
21 has suggested is they will tell all of their non-defendant
22 suppliers, or at least the ones from whom we want certain
23 data, they will say, oh, the serving parties would like the
24 documents and data, is that okay? And of course they are
25 going to say no. And then Toyota has no interest in

1 negotiating on our behalf, they clearly sympathize with the
2 non-defendant suppliers, so they are not going to endeavor to
3 encourage them to produce it, so we are going to be at a
4 standstill again. What's going to happen? We are going to
5 come back to you or we are going to have to come back to
6 Special Master Esshaki and we are looking at another three
7 months of wallowing in OEM discovery when, respectfully, I
8 think we all hope we can move forward and get on with the
9 litigations with the OEM discovery that the parties require
10 to litigate their cases.

11 Thank you, Your Honor.

12 THE COURT: Okay. Thank you.

13 MR. SCHAPER: Your Honor, as to the point that
14 Toyota is the only OEM objecting on this particular issue,
15 it's hard to say why the parties and the Special Master dealt
16 with each of the OEMs separately, and some OEMs have had
17 issues like the ones that Honda briefed for you and addressed
18 earlier today, GM has some of its own issues and Toyota has
19 its own issue. We have our own contract with suppliers and
20 that's our relationship with them, but I don't think it is --
21 I don't think that really reveals much.

22 Just to be clear, we are not -- Toyota is not
23 claiming that it should never have to produce this
24 information which Mr. Hemlock's arguments seem to maybe
25 suggest. We are not saying that we won't produce it. We are

1 just saying that there should be some protections in place
2 given that it is information of our non-defendant suppliers,
3 most specifically, the ability to anonymize their
4 information. So that's what we are seeking. We are not
5 saying that we should be exempt from having to produce it at
6 all.

7 Thank you, Your Honor.

8 THE COURT: All right.

9 MR. HEMLOCK: Your Honor, I apologize, forgive me.
10 I neglected to address the anonymity point. May I just have
11 one minute on that? I'm sorry. That was my mistake.

12 Regarding the disguising of the names of the
13 non-defendant suppliers, so Mr. Schaper raised the issue of
14 why that's important to the serving parties. So obviously a
15 big issue in all of these cases will be comparing the prices
16 of the parts that were sold by the alleged conspirators to
17 those that were not affected by the conspiracy and seeing
18 whether they are different or the same and how different
19 costs and so on may have affected those different prices.

20 Obviously knowing who the non-defendant suppliers
21 are is very important, A, because you would want to compare
22 it. For example, if they were an AVRIP supplier that sold to
23 Toyota, Nissan, Honda, you would want to be able to say,
24 okay, well if non-defendant supplier X sold to each one of
25 them, you would want to compare the data from the three

1 different OEMs to see how it all fits together. If the names
2 of the parties are anonymized, we won't be able to do that.

3 Second of all, there may be unique circumstances
4 why certain suppliers have different prices than others that
5 could be determined through discovery. For example, some
6 suppliers may have certain costs, maybe they manufacture
7 abroad and import and that affects their costs versus other
8 ones that manufacture domestically, and all of those things
9 would be factored into what the economists and the lawyers
10 use both at class cert as well as during the damages phase.
11 But to do any of that, you would need to know who was who,
12 and for that reason, we think that it is very important to
13 have the names of the non-defendants suppliers.

14 Thank you, Your Honor.

15 THE COURT: All right.

16 MR. SCHAPER: Your Honor, may I just add one thing
17 in response to that?

18 THE COURT: Sure.

19 MR. SCHAPER: We would think that the important
20 information there would be whether the suppliers are
21 defendants or not because if the defendants are going to say
22 that somehow non-defendant supplier pricing was similar to
23 theirs, for example, our data would allow them to do that
24 because it would be clear who the non-defendants were and the
25 defendants' names would appear, so they would have that

1 information and they would be able to do with that and their
2 experts would be able to work with that in that fashion, so
3 we don't think that our proposal compromises that.

4 Thank you, Your Honor.

5 THE COURT: All right. There seems to be
6 difficulty in that masking of the identities of the
7 companies. It seems that -- it seems that the Master looked
8 at this, the whole issue, at a hearing. And, again, I hate
9 to say this, but that abuse of discretion standard is a very
10 high standard, and the abuse of discretion is a standard that
11 applies here, and there is nothing showing me that this is an
12 abuse of discretion. There are safety features that are
13 built in the protective orders, et cetera, to try and avoid
14 some of this, what do I want to say, distribution of this
15 information because clearly the Court recognizes how very
16 critical it is to the companies to have this price
17 information be kept as confidential as possible. But I think
18 even if there are these -- well, there are these
19 confidentiality -- maybe confidentiality agreements which we
20 discussed -- well, you weren't here this morning -- and it
21 seems to me that the discovery trumps this as long as there's
22 sufficient protections in line, and I do think that there
23 are. So I can't say this was an abuse of discretion by the
24 Master, and therefore the Court affirms him. Thank you.

25 Okay. I think that's all, right? Anybody have

1 anything else? No. Thank you. Very good briefs, I mean
2 very detailed. I appreciate the -- and arguments. Thank
3 you. Some of these are the shortest briefs that anyone has
4 ever submitted in this MDL.

5 THE LAW CLERK: All rise. Court is adjourned.

6 (Proceedings concluded at 3:09 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of In Re: Automotive Parts Antitrust Litigation, Case No. 12-02311, on Tuesday, May 16, 2017.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 06/05/2017
Detroit, Michigan